In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-308

JOSEPH C. TARQUENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor's remarks during closing argument deprived him of a fair trial.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of two counts of selling counterfeit money, in violation of 18 U.S.C. 473. He was sentenced to a term of two years' imprisonment, to be followed by three years' probation. The court of appeals affirmed (Pet. App. A).

The evidence, which petitioner concedes is sufficient (Pet. 4, 6), established that in November 1973 petitioner sold eight counterfeit $10 notes to John Lorenzi, a Secret Service agent. The meeting between petitioner and Lorenzi had been arranged by James Byrnes. Petitioner told Lorenzi that Byrnes could arrange additional meetings, if Lorenzi was interested (Tr. 27). In December 1973, at a second meeting, petitioner sold Agent Lorenzi approximately $2,000 face value of counterfeit notes for $850 (Tr. 36, 39-40, 90-91), and instructed him how to treat the bills to make them easier to "pass" (Tr. 41).

1. Petitioner argues (Pet. 5-6) that a number of the prosecutor's remarks during closing argument were improper and deprived him of a fair trial. The court of appeals correctly rejected this argument as "frivolous" (Pet. App. 2).

a. Petitioner contends that the prosecutor's statement, "[a]nd if you do not believe him, there is no one else to believe" (Tr. 143), was an unfair comment upon his decision not to testify (Pet. 6, n. 9). The remark referred to the testimony of Agent Koll, who related (Tr. 95-99, 102-103, 115-117) that Byrnes had been arrested previously for passing counterfeit money received from petitioner and that Byrnes' role in the instant case was to introduce Agent Lorenzi to petitioner.[1] The purpose of the prosecutor's com-

[1] The full statement was (Tr. 143):

> The only testimony we heard on [the entrapment issue] was what Agent Koll told you. And if you do not believe him, there is no one else to believe. He told you that

ment was to emphasize that Koll's testimony—which was the only evidence relating to entrapment—negated petitioner's entrapment defense. The remark in question was neither intended to be a comment on petitioner's failure to testify nor of such a character that the jury would naturally and necessarily take it to be such a comment. As the court below observed (Pet. App. 2), "the prosecutor's remarks on the entrapment defense, rather than being comment on the failure of [petitioner] to testify, merely pointed out the lack of evidence on that issue."

b. Petitioner also asserts that the prosecutor improperly interjected his personal opinion into his closing argument. But as the court below determined from a full review of the record (Pet. App. 2), in each instance "the prosecutor was drawing reasonable inferences from the evidence." This essentially factual disposition does not require further review.

Petitioner points first (Pet. 5) to the prosecutor's statement, "I do not think [petitioner] was doing this for free" (Tr. 128). Petitioner argues that this was improper because no evidence was introduced to show that petitioner had received any money (Pet. 5, n. 6). However, making an illegal profit is the goal of trafficking in counterfeit notes. The intensive

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Mr. Byrnes was arrested and Mr. Byrnes stated that he could introduce an agent to his source of supply. And that is really all there was. There was nothing else. Mr. Byrnes did not participate in the negotiations. He was not there in the washroom when the transfer took place. He was simply an intermediary. And that does not consist of entrapment.

bargaining between petitioner and Agent Lorenzi (Tr. 26-27, 34-36) clearly reflected petitioner's desire to maintain a certain profit margin on each sale.

The statement, "I do not believe that Jimmy Byrnes could, in fact, have gotten the bills even if he wanted to" (Tr. 132), was also a proper inference from the evidence. The prosecutor was referring to the arrest of Byrnes for an earlier counterfeiting offense; the purpose of the remark was to emphasize that, contrary to defense counsel's insinuations (Tr. 113-114, 137), Byrnes was not petitioner's source for counterfeit notes. Indeed, there was evidence that petitioner had supplied the bills to Byrnes prior to Byrnes' arrest (Tr. 137) and that petitioner had his own source for the bills that he sold to Lorenzi (Tr. 33).[2]

c. Petitioner contends that he was deprived of a fair trial when the prosecutor stated: "[T]here is no question the defendant is guilty beyond not only a reasonable doubt, but in my mind any shadow of a doubt" (Tr. 133). The court of appeals, while disapproving this remark, correctly held (Pet. App. 2) that any error was harmless.[3] The trial judge gave

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[2] Similarly, there is no merit to petitioner's objection (Pet. 5, n. 8) to the prosecutor's statement (Tr. 132-133): "We have very good evidence, I think, to show that [petitioner]" was the source of counterfeit bills for Byrnes. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647.

[3] Expressions of opinion during closing argument have been held to be permissible when they do not lead the jury to believe that counsel is basing his opinion on matters outside the record (*Lawn* v. *United States*, 355 U.S. 339, 359-360,

appropriate cautionary instructions (Pet. App. 2), and the evidence of guilt was "overwhelming" (*ibid.*).

2. Petitioner also contends (Pet. 6-14) that there is a conflict among the circuits concerning the application of the harmless error rule to closing arguments. However, the courts of appeals uniformly base their decision to reverse on whether or not the defendant was prejudiced by the argument as determined by an examination of the entire proceedings, including the curative instructions given by the trial judge, the weight of the evidence, and the prejudice inherent in the improper remark. *United States* v. *Cotter*, 425 F.2d 450, 453 (C.A. 1); *United States* v. *White*, 486 F.2d 204, 206-207 (C.A. 2), certiorari denied, 415 U.S. 980; *United States* v. *Somers*, 496 F.2d 723, 740-741 (C.A. 3), certiorari denied, 419 U.S. 832; *United States* v. *Gambert*, 410 F.2d 383, 385 (C.A. 4); *United States* v. *Conway*, 507 F.2d 1047, 1052 (C.A. 5); *United States* v. *Peak*, 498 F. 2d 1337, 1338 (C.A. 6); *United States* v. *Trutenko*, 490 F.2d 678, 680-681 (C.A. 7); *United States* v. *Bettenhausen*, 499 F.2d 1223, 1233 (C.A. 10). Although the courts often use different verbal formulae, they have adopted the same approach—the error is harmless if the evidence was strong enough to

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n. 15), even where the opinion related to defendant's guilt. *United States* v. *Sawyer*, 347 F.2d 372 (C.A. 4); *Thompson* v. *United States*, 272 F.2d 919, 921-922 (C.A. 5), certiorari denied, 362 U.S. 940; *Schmidt* v. *United States*, 327 F.2d 542 (C.A. 8). The remark in question appears to be within this category.

negate any substantial possibility that the improper remark influenced the jury's verdict. None of the cases on which petitioner relies would require a reversal where, as here, all evidence was on one side and an acquittal was "inconceivable" (Pet. App. 2).

Contrary to petitioner's assertions (Pet. 6, 10), the Third Circuit has not formulated a *per se* rule dispensing with the harmless error test. In *United States* v. *Schartner*, 426 F.2d 470 (C.A. 3), on which petitioner relies (Pet. 6), the court found the following remark to be inherently prejudicial (426 F.2d at 478): "I say to you with all the sincerity I can muster that if you do not convict the defendant the guilty will escape." The court concluded that this comment directly invited the jury to rely on the prosecutor's "experience" and "sincerity."[4] Later, in *United States* v. *Somers*, 496 F.2d 723, 740 (C.A. 3), certiorari denied, 419 U.S. 232, the Third Circuit refused to extend its holding in *Schartner* and rejected the use of *per se* rules as "inappropriate to the evaluation of prosecutorial misconduct. Except where a type of comment is inherently prejudicial (as in *Schartner*), prosecutorial misconduct should be evaluated on a case-by-case approach. See *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973)."

In short, the positions of the various circuits are consistent and fully comport with the case-by-case

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[4] The court contrasted this statement with the case where (as here) the prosecutor merely states that he is "convinced" of the defendant's guilt. 426 F.2d at 478, n. 9.

approach to prosecutorial misconduct taken by this Court. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643; *Berger* v. *United States*, 295 U.S. 78, 89.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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